Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields	)	ET Docket No. 03-137
	)	
	)	

MOBILE MANUFACTURERS FORUM'S

OPPOSITION TO THE AMERICAN ASSOCIATION OF JUSTICE'S

PETITION FOR RECONSIDERATION

I. Introduction and Statement of Interest

The Mobile Manufacturers Forum (MMF)[1] hereby opposes the Petition for Reconsideration filed by the American Association for Justice (AAJ)[2] – formerly the American Trial Lawyers of America – and supports the determinations of the Federal Communications Commission ("FCC") in the above-captioned proceeding.[3] The MMF comprises manufacturers that engage in designing products that comply with the RF exposure requirements for wireless products and in arranging testing that determines a product's Specific Absorption Rate (SAR).

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[1] The MMF is an international association of telecommunications equipment manufacturers with an interest in mobile or wireless communications, including the manufacturers of mobile handsets and devices as well as the manufacturers of the network infrastructure. Established to support research into the health and safety of radio frequency electromagnetic fields, the MMF has worked with national and international health agencies to support identified research. Further information on the MMF can be found on our website at www.mmfai.org.

[2] Petition for Reconsideration of the American Association for Justice, ET Docket No. 03-137 (filed Jul. 1, 2013) ("Petition").

[3] Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, *First Report & Order, Further Notice of Proposed Rulemaking, Notice of Inquiry*, ET Docket Nos. 13-84, 03-137, (rel. Mar. 29, 2013) ("R&O").

Among other determinations in the FCC's R&O was the classification of the outer ear – or pinna – as an extremity.[4] As a consequence of that classification, the SAR limits for extremities apply to the pinna, just as for hands, wrists and limbs where there are no major organs subject to RF exposure. The FCC came to its decision only after it conducted a careful review and analysis of the determinations both of IEEE[5] and of the Food and Drug Administration (FDA): "We conclude that classification of the pinna as an extremity is supported by the expert determinations of the FDA and of the IEEE, will have no practical impact on the amount of human exposure to RF radiation, and is therefore appropriate."[6] Notwithstanding the FCC's careful consideration of the matter, the AAJ argues that the FCC's order should be reconsidered due to its failure to consider two mandatory factors,[7] which are based on requirements under the Investment Company Act (ICA).[8] Presumably – but not clearly (as will be further discussed below) – the AAJ argues that the FCC failed to consider the ICA factors and, therefore, the classification of the pinna constitutes an arbitrary act and abuse of discretion under the Administrative Procedure Act (APA).[9]

The MMF notes at the outset that the AAJ trail lawyers failed to appear and file in the initial round of comments on the matter. The AAJ, therefore, must meet a

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[4] R&O at Par. 43.
[5] IEEE Std C95.1, *IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz* (2005) at § C.2.2.2.3, *Rationale for applying the peak spatial-average SAR values for the extremities to the pinna*.
[6] R&O at Par. 42.
[7] Petition at 3.
[8] 15 USCS § 80-1 et. seq.
[9] 5 USCS § 551 et. seq.

high bar before it can seek reconsideration of the Order, and it has failed to do so.[10] In any event, as demonstrated below the AAJ is not correct, either regarding the standard to be applied to the FCC's order or regarding its characterization of the FCC's conduct. More specifically, the MMF position is: (1) the AAJ petition is procedurally defective on two grounds – (a) it is procedurally barred from seeking reconsideration since it did not appear in the initial round of comments, and (b) it has failed to demonstrate a proper interest in the proceeding; (2) in relying upon ICA factors the AAJ has applied an incorrect standard to the FCC; and (3) the FCC conducted an appropriate review of the facts and, in its review of the matter, properly utilized the work of a standards body and the Food and Drug Administration (FDA).

II. The AAJ Petition is Procedurally Defective

a. AAJ Is Barred under FCC's Procedures from Seeking Reconsideration

The FCC's procedural rules do not permit arguments or facts not previously raised to be argued on reconsideration unless specific conditions are met -- that is, a showing of "changed circumstances", arguments previously "unknown to petitioner" or consideration of the arguments are "required in the public interest."[11] The AAJ Petition fails to make any showing that would meet this requirement or, indeed even to refer to the requirement. Accordingly, the Petition should be dismissed out of hand.

[10] *See* note 11 and accompanying text, *infra*.
[11] 47 CFR 1.429(b)(1)-(3) (2011)

b. AAJ Has Failed to Set Out Its Interest in the Proceeding

Comments are filed in FCC rulemaking proceedings pursuant to section 553(c) of the APA[12] ("the agency shall give interested persons an opportunity to participate in the rule making . . . ") and the FCC's rules of procedure ("[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation").[13] The AAJ trial lawyers, however, have set out no statement of how the AAJ qualifies as an "interested person." There is no statement whatsoever about the impact of the R & O on the AAJ. Without such a showing, the AAJ comments should not be given weight.

III. The AAJ Has Applied the Wrong Standard for the FCC's Rulemaking

The AAJ principally relies on *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), reh. den., (D.C. Cir. 2005) (hereinafter "*Chamber of Commerce*"). AAJ argues that the FCC is bound by the same standard that *Chamber of Commerce* applies to decisions by the Securities and Exchange Commission (SEC) and, therefore, FCC should have undertaken the same two-pronged inquiry set out in *Chamber of Commerce* where it directed the agency to determine: (1) the ability of the SEC to develop new data or to consider existing empirical data in undertaking

[12] 5 USCS §§ 500, et. seq.
[13] 47 CFR 1.429(a)

the rulemaking and (2) whether the SEC considered the costs of the conditions it was imposing. The AAJ Petition goes on to argue that the FCC did not adequately take empirical data and costs into consideration and, therefore, the FCC should reconsider its classification of the pinna. Given the improper standard that AAJ is attempting to apply, together with the substantive review conducted by the FCC before the order, there are substantial flaws in the AAJ's position.

At the outset, it is clear that the holding of AAJ's principal case, *Chamber of Commerce*, does not apply to the FCC. The factors put forth by the *Chamber of Commerce* court – however they may be interpreted – are specific factors established by statute under the Investment Company Act (ICA).[14] That statute specifically sets out criteria that the SEC must consider in a rulemaking and states that the SEC must engage in the following: "Consideration of promotion of efficiency, competition, and capital formation."[15] Because of the specific terms of the statute, any decision by the SEC that fails to consider the stated factors is deemed arbitrary and capricious on its face.[16] The FCC, however, is not subject to the ICA, and the specific provisions of the statute do not apply to the FCC. Accordingly, the established standard under the Administrative Procedure Act – that is, the "arbitrary and capricious" standard[17] – and not the ICA provisions constitutes the appropriate standard for the FCC's actions. As shown below, there is no question but that the FCC met the standard when it classified the pinna as an extremity.

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[14] 15 U.S.C.S. § 80a-1 et.seq.
[15] *Id*. at § 80a-2c
[16] Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d, 1209, 1216 (DC App. 2004) (rule is "arbitrary and capricious" if agency fails to consider factors "it must consider under its organic statute").
[17] 5 USCS § 706(2)(A)

IV. The FCC Conducted a Proper Review and Did Not Exercise an Abuse of Discretion before Issuing the R & O

The Administrative Procedure Act states that the relevant standard for assessing agency conduct of the type at issue in this case is whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".[18] There is considerable case law applying that standard to actions by the FCC.[19] Accordingly, if the FCC chooses to redraft the challenge by the AAJ Petition to apply the correct standard, the question then becomes whether the FCC's R & O constitutes arbitrary action or an abuse of discretion. As shown below, the FCC demonstrated a substantial basis for its action and, therefore, was well within its authority to make the classification.

In *Cellular Task Force v. FCC*[20] the court, among other matters, reviewed the FCC's promulgated guidelines for RF exposure. In upholding the FCC's order against claims that the order was not valid because the FCC should have taken opposing scientific theories into consideration, the court stated the well-accepted principle that the factual findings needed to support an agency decision should be more than a "scintilla" but can be less than a preponderance, provided the body of evidence has been considered.[21] Importantly, the court noted that "[t]he reviewing court must take into account contradictory evidence in the record, but the possibility of

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[18] *Id.*

[19] *E.g., United States Telecom Ass'n v FCC,* 360 US App DC 202, 359 F3d 554, (DC Cir. 2004) *cert den* 125 S Ct 313, 160 L Ed 2d 223 (2004) and *cert den.,* 125 S Ct 316, 160 L Ed 2d 223 (2004) and *cert den.,* 125 S Ct 345, 160 L Ed 2d 223. (2004); *Cellular Phone Task Force v. FCC,* 205 F3d 82 (2d Cir. 2000); *Committee for Effective Cellular Rules v FCC* , 311 US App DC 345, 53 F3d 1309.(DC Cir. 1994).

[20] 205 F3d 82 (DC Cir. 2000)

[21] *Id.* at 89.

drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[22] Further, the court found that the ANSI and NCRP standards bodies that the FCC relied upon, as well as its consultation with federal agencies responsible for health and safety, provided a justifiable basis for its decision.[23]

The *Cellular Task Force* case provides clear precedent for the FCC's actions in the present matter. Here, just as in *Cellular Task Force*, the FCC relied on a determination by a standards body – IEEE – as well as on the expertise of the FDA:

> We conclude that classification of the pinna as an extremity is supported by the expert determinations of the FDA and of the IEEE, will have no practical impact on the amount of human exposure to RF radiation, and is therefore appropriate. The FDA in particular has statutory responsibility to carry out a program designed to protect public health and safety from electronic product radiation and we therefore place heavy reliance on its public health and safety determinations. [24]

Such actions are squarely within the range of justified agency actions and do not constitute an abuse of discretion.

Moreover, just as in Cellular Task Force, the expert standards body (IEEE) relied upon here carefully considered the pros and cons of the determination before arriving at its conclusion.[25] In fact, the IEEE had a high bar to meet: it was required to address a challenge by the Radio Frequency Interagency Work Group to present a

[22] *Id* at 89 citing *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 69 L. Ed. 2d 185, 101 S. Ct. 2478 (1981) (internal citations and quotation marks omitted).
[23] *Id*. at 90-91.
[24] R & O at Par. 47
[25] Note 5, supra.

clear rationale for the pinna classification.[26] The FCC noted that "[w]e find that the IEEE's expert consideration of recent research has alleviated the concerns raised about the pinna by the EMR Network and the RFIAWG."[27] Therefore, just as in *Cellular Task Fo*rce, it was reasonable for the FCC to rely upon the standard body's efforts.

The FCC did not limit its reliance to the IEEE. It also consulted with the FDA, which expressly determined that the "increase in allowable power deposition [due to treating the pinna as an extremity] will not be significant enough to cause concern."[28] Thus, the FCC's review of the pinna matter was comprehensive: it addressed the detailed concerns of the federal agencies represented by the RFIAWG; it relied on substantial work done by an expert standards body; and it included the specific approval of the FDA.

CONCLUSION

In summary, the AAJ's petition for reconsideration is procedurally flawed, both because AAJ did not raise its arguments at the initial hearing and because it has stated no interest in the proceeding. The petition is also substantively flawed in that the AAJ has applied an incorrect standard from the ICA to the FCC's determination. In any event, the FCC's order is directly supported by the *Cellular Task Force* precedent, which makes clear that the order classifying the pinna as an extremity is

[26] R&O at Par. 46. The Radio Frequency Interagency Work Group comprises the federal agencies tasked with addressing potential health effects, including the Food and Drug Administration, the Environmental Protection Agency, and the Occupational
[27] R&O at Par. 46.
[28] R&O at Par. 45.

an authorized, responsible action and not arbitrary or an abuse of discretion.

Accordingly, the MMF urges the FCC to reject the petition for reconsideration.

Respectfully submitted,

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September 10, 2013